SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 252.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY CO.

vs.

COMMONWEALTH OF KENTUCKY.

No. 253.

CINCINNATI, COVINGTON & ERLANGER RAILWAY CO.

vs.

COMMONWEALTH OF KENTUCKY.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

The Court of Appeals of Kentucky did *not* hold or intimate that the South Covington Co. was without charter power to operate its interstate street cars over the right of way of the Erlanger Company, and that therefore separate coaches or compartments could be required on the Erlanger road regard-

less of their effect upon such interstate commerce. The charter powers of the two companies were not discussed or mentioned in connection with the interstate commerce or Federal question.

The only reference to the charter power of the South Covington Co. was in answer to our contention that the charter of that company authorized it to operate a street railway line over the Erlanger right of way; that it did operate such a line, and that therefore the separate-coach law, which did not apply to street railroads, did not apply to it. The court said (page 54 in R. 252):

> "It (the Erlanger Co.) cannot escape its responsibilities as an interurban railroad by claiming or undertaking to operate it as a street railroad or authorizing any one else to do so, because in the contemplation of the statute, and the holdings of the court, exempting street railroads from the application of section 795, *supra*, it is impossible to operate a street railroad upon its road. It is contended that the South Covington and Cincinnati Street Railway Company is authorized by its charter to operate a street railroad upon the road of the Erlanger Railway Company, but an examination of the charter does not seem to justify the contention, and if authorized to operate the line, not being a street railroad, it would be required to comply with the statute in its operation."

This only means that whatever was operated over the Erlanger right of way would be assumed or construed to be a so-called interurban operation referable to the Erlanger charter, and therefore within the operation of the separate-coach law under section 842 A. (See our main brief, page 17.)

Even if the court had held, which it did not, that the

operation of street cars over the Erlanger right of way was without charter authority, such operation, as long as permitted, could not be deprived of the constitutional protection of the interstate commerce clause.

In the Detroit Street Railway case recently decided by this court, it was held that where the franchises had expired, and the city had a right to expel the street railway from the streets, the city could not, while it permitted the street railway to be operated on such streets, impose confiscatory rates of fare.

An analogous principle is to be found in C., B. & Q. R. R. *vs.* R. R. Commission of Wisconsin, 237 U. S., 220, where the court holds that an unlawful interference with interstate commerce cannot be defended as an amendment by the State of the corporate charter of the railroad company.

Turning to another subject, Chiles *vs.* C. & O. R. R., 218 U. S., 71, merely holds that a railroad may adopt a rule segregating its colored interstate passengers. It does not hold that a State law may require it to do so. In effect it holds to the contrary, on page 75.

In the absence of Federal legislation on the subject, the carrier is entitled to decide this question for itself in accordance with the facts or needs of the particular situation.

Respectfully submitted.

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